

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-219676.2; B-219676.3 **DATE:** February 25, 1986

MATTER OF: Right Away Foods Corp.

DIGEST:

1. Multiple awards to two offerors responding to request for proposals limited to industrial mobilization planned producers for field rations which resulted in the lowest overall cost to contracting agency, but did not result in the protester, the lowest individual offeror, receiving an award for the maximum quantity offered, is not improper under RFP award procedure.
2. Decisions as to how many producers are to be included in the mobilization base must be left to the discretion of the military agencies, and GAO questions those decisions only if the evidence convincingly shows the military agency has abused its discretion. Protester speculates that contracting agency did not follow prescribed procedures in qualifying new, planned producer and that the lack of capacity in the producer's proposed subcontractor was such that the new producer should not have qualified. But this speculation is not convincing evidence showing that the military agency has abused its discretion in qualifying the producer.

Right Away Foods Corp. (Right Away) has protested the awards of contracts by the Defense Logistics Agency (DLA) to Southern Packing and Packaging Co., Inc. (Southern), and CINPAC Inc. (CINPAC) under request for proposals (RFP) No. DLA13H-85-R-8457 issued on June 25, 1985, for cases of combat field rations. The RFP was restricted to planned producers who have industrial preparedness planning agreements with DLA.

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Right Away contends that the Southern contract was improper because it did not result in award to the low offeror and that the CINPAC contract was improper because the company should not have been considered an eligible planned producer. We deny the protests.

Under the RFP, offerors were required to submit two separate proposals depending on the number of "retort meats" that were required under each alternate approach to be evaluated. Offerors were also invited to submit proposals based on their approved production capacities for the required cases of items for three "maximum share quantities," which were listed in the RFP, as follows:

"(monthly capacity)	<u>Maximum Share Quantity</u>	<u>% of Requirement</u>
1,800,000-unlimited	1,879,401	45%
1,200,000-1,799,999	1,461,756	35%
600,000-1,199,999	835,290	20%"

Nevertheless, offerors were cautioned that no one offeror would receive an award for more than the 45-percent maximum share quantity unless all three shares could not otherwise be awarded. DLA reports that both Right Away and Southern were equally entitled to, and did, in fact, submit offers on the highest share (45 percent) to be awarded given their production capacities. After negotiations were concluded, the low offerors' prices for these shares on the alternate approach selected--the one involving the furnishing of fewer retort meats--were:

"45% Quantity--

Right Away	\$18.30
Southern	\$18.5037

"35% Quantity--

Right Away	\$19.57
Southern	\$20.14415

"20% Quantity--

[CINPAC was the low offeror and its price
is not material to Right Away's protests]"

DLA states that, although Right Away was the low offeror on both of the higher quantity shares, the most financially advantageous combination (by over \$400,000) of awards for these shares was to award Southern the 45-percent share (at a price of nearly \$35,000,000) and Right Away the 35-percent share (at a price of nearly \$29,000,000). CINPAC received the award for the 20-percent share.

Southern Contract

Right Away does not question DLA's numerical analysis, but the company insists that the RFP contemplated that each share would be awarded to the lowest offeror for that share since no offeror would be entitled to award for more than one share. And Right Away argues that it, as low offeror, should have received the 45 percent award.

Southern argues that Right Away's protest is untimely because the RFP allegedly clearly provided for the method of award actually chosen by DLA and that what Right Away is now protesting is an alleged solicitation defect which should have been the subject of a preclosing date protest. But, Right Away is actually questioning whether the RFP clearly provided for the method of evaluation employed; consequently, this issue of RFP interpretation has been timely raised after DLA's announcement of its intended award method.

We have previously upheld contract awards in similar circumstances. In B-153687, July 7, 1964, the offeror who submitted a lower price on the item received an award for a basic quantity which was less than the quantity awarded to another higher priced offeror since the contracting agency determined that a combination of awards on that basis resulted in the lowest overall cost. The RFP in that case did not provide expressly for multiple awards but we recognized that the sole purpose of the RFP was to satisfy the agency's needs at the lowest overall cost. We denied the protest. Further, in 50 Comp. Gen. 777 (1971), we upheld multiple awards which also denied the lowest offeror from receiving the maximum quantity proposed since the "Army's combination of awards resulted in the lowest overall cost to the Government." See also Steel King Industries, B-209239, May 5, 1983, 83-1 C.P.D. ¶ 473.

Since the combination awards in this case resulted in the lowest overall cost to the government and the award procedure was not prohibited by the RFP, we find the awards were proper.

CINPAC Contract

Right Away contends that CINPAC, which was awarded the 20-percent share, should not have been considered eligible as a planned producer under the RFP because it allegedly lacks the capacity to furnish the required items at the required production volume. In Right Away's comments on DLA's report on its protest, Right Away specifically alleges that DLA improperly qualified CINPAC because DLA allegedly did not: (1) verify the representations made by CINPAC to DLA in CINPAC's application (on "DD" Form 1519) for planned producer status; (2) conduct the planned producer survey "required by the RFP"; (3) obtain the required recommendation of the "Armed Services Production Planning Officer" concerning CINPAC's application; or (4) realize that CINPAC's planned subcontractor is already committed to substantial production on other contracts with Right Away and the government to the extent that CINPAC should not be considered eligible as a planned producer.

Decisions as to how many producers are to be included in the mobilization base must be left to the discretion of the military agencies, and our Office questions those decisions only if the evidence convincingly shows that the military agency has abused its discretion. Martin Electronics, Inc., B-219803, Nov. 1, 1985, 65 Comp. Gen. ____, 85-2 C.P.D. ¶ 504.

DLA reports that it did review CINPAC's planned producer documentation submitted before proposals were due and that DLA reviewed the documentation to determine if CINPAC qualified as a planned producer, "which it did." Further, in DLA's report on the protest of Freedom N.Y., Inc., also against the CINPAC award, which was the subject of our decision in Freedom N.Y., Inc., B-219676, Dec. 6, 1985, 85-2 C.P.D. ¶ 635, DLA's contracting officer stated that CINPAC's "planned producer capability was being evaluated" from the date CINPAC's planned producer application was received (by June 10, 1985) and further advised it was completed prior to August 8, 1985, the original closing date for the RFP.

We have no details as to precisely what was done by DLA in reviewing CINPAC's planned producer capability prior to the RFP's closing date. Right Away infers from the absence of DLA's explanation as to what specifically went on during DLA's preclosing date review of CINPAC's eligibility that DLA did not, in fact, verify and evaluate CINPAC's capability as

required. Nevertheless, we consider this inference to be only speculation that DLA did not, in fact, follow established planned producer procedures during the period in which DLA states it reviewed CINPAC's capability. Moreover, in Freedom N.Y., Inc., supra, we concluded that "DLA's official statement that CINPAC had qualified was sufficient evidence in itself of CINPAC's status in the absence of contrary evidence."

Finally, we consider Right Away's specific allegation about the lack of capacity in CINPAC's subcontractor to be speculative at best for Right Away admits that at present the alleged subcontractor still has excess production capacity currently available even given its current commitments to Right Away and DLA. In any event, Right Away overlooks the possibility that other subcontractors--established firms as well as concerns new to the program--could become available to CINPAC in the future.

Consequently, we do not consider Right Away's allegations in this protest to be convincing evidence that DLA has abused its discretion in determining that CINPAC is entitled to be considered a planned producer.

We deny the protests.

for Seymour Efron
Harry R. Van Cleve
General Counsel